Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunication Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use Of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

A mandatory opt-in approval requirement would not survive constitutional scrutiny. To retain this approach, the Commission would, at a minimum, have to demonstrate proper tailoring under *Central Hudson*. A mandatory opt-in approach is not tailored to safeguard privacy interests because it excessively burdens free speech. Further, a substantially less restrictive, obvious alternative exists — opt-out.

Prior to the 1996 Act, the Commission used an opt-out approval mechanism to obtain CPNI approval. The Commission then reasoned that opt-out notification, where the customer had the opportunity to restrict dissemination of their proprietary information, was an appropriate safeguard to protect both privacy and competitive interests. The same reasoning holds true today. The Commission has yet to show, and could not show, that opt-out is no longer sufficient to ensure customer privacy.

An opt-out approval mechanism would achieve Congress' consumer privacy interests. Consumers would be informed of their CPNI rights and given an opportunity to restrict the use or disclosure of their CPNI. Opt-out, therefore, would give consumers control over the use of their CPNI. Moreover, both the Commission and Congress, in its regulation of other industries, such as the financial and health care industries, have deemed opt-out approval sufficient to safeguard consumer control.

The Commission should give carriers the flexibility to use opt-in or opt-out approval methods, subject to minimum notification requirements. This would allow carriers to use the approval method best suited for the particular customer at issue, while ensuring informed consent. SBC supports a 30-day written opt-out approval notice.

The Commission should modify its current notification requirements to require that carriers notify consumers of what CPNI is, their CPNI rights, purposes for which the CPNI will be used and methods by which to restrict such use. Any other requirements are excessive and unduly burdensome to carriers and customers alike.

The Commission should not revisit its prior determinations regarding the interplay of Sections 222 and 272. Use of opt-out does not alter the Commission's prior conclusions. Moreover, the Commission's determination that Section 272 did not apply to CPNI did not hinge upon any approval method, rather on congressional intent and public policy reasons. Further, application of section 272 would abridge free speech.

However, should the Commission incorrectly determine that section 272 should apply, it would not apply to a BOC's use of CPNI to joint market, or a BOC's solicitation of approval to joint market Section 272 affiliate services.

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COMMENTS OF SBC COMMUNICATIONS INC TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

SBC Communications (SBC), on behalf of itself and subsidiaries, hereby files these comments in response to the Second Further Notice of Proposed Rulemaking (NPRM) in the above-captioned docket.[1] As detailed in these comments, a mandatory opt-in approval requirement would not withstand constitutional scrutiny. The Commission therefore should revise its rules to permit carriers the flexibility to use opt-in or opt-out, subject to minimum notification requirements. The availability to carriers of an opt-out option in no way implicates the basis on which the Commission previously concluded that section 272(c)(1) does not apply to a BOC's sharing of CPNI with its section 272 affiliates. That decision was correct when made and should not be disturbed here.

[1] Notice of Proposed Rulemaking, *In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, FCC 01-247 (rel. Sept. 7, 2001) (*NPRM*).

I. Background

In its *CPNI Order*,[2] affirmed on reconsideration,[3] the Commission held that carriers may only use, disclose, or permit access to individually identifiable customer proprietary network information (CPNI) if they obtained prior express approval from the customer at issue. In so holding, the Commission rebuffed arguments that its "opt-in" approach violated the First Amendment. It held that this approach did not abridge free speech at all, but that, even if it did, it nevertheless was "narrowly tailored" to achieve congressional objectives and could thus pass constitutional muster.[4]

The Commission's conclusion that its "opt-in" requirement was narrowly tailored was wholly unsupported. The Commission did not examine whether congressional objectives could be achieved through an alternative opt-out mechanism. It simply stated as a bald conclusion that "an express approval requirement is narrowly tailored to achieve … Congressional objectives."[5]

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[2] Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115 and 96-149, 13 FCC Rcd 8061 (1998) (*CPNI Order*).

[3] Order on Reconsideration and Petitions for Forbearance, *In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115 and 96-149, 14 FCC Rcd 14409 (1999) (*Reconsideration Order*).

[4] *CPNI Order*, ¶107.

[5] *Id.*

On appeal, the United States Court of Appeals for the Tenth Circuit vacated the Commission's mandatory opt-in requirement on First Amendment grounds.[6] The court concluded, first, that "the CPNI regulations implicate the First Amendment by restricting protected commercial speech."[7] Having reached this conclusion, the court next determined that it must subject the mandatory opt-in requirement to the four-part test established in *Central Hudson.*[8] The court quickly found that the commercial speech at issue was lawful and non-misleading and thus proceeded to examine the opt-in requirement under the remaining three-prongs. While the court expressed serious concern over whether a mandatory opt-in requirement satisfied the second and third prongs of the *Central Hudson* test, it found that, even assuming *arguendo* that those prongs were met, the Commission clearly had not met its burden of showing that "the FCC rules regarding customer approval [were] properly tailored," as required under the fourth prong.[9] It noted, in particular, that the Commission had failed adequately to consider "an obvious and substantially less restrictive alternative, an opt-out strategy[,]" and found that "the record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy."[10] It held that, in order for the Commission to satisfy the fourth prong of *Central*

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[6] *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (June 5, 2000).

[7] *Id.* at 1233.

[8] *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). Under the four-prong test of Central Hudson, the government must first determine if the commercial speech is lawful and not misleading. If these requirements are met, the government can restrict such speech only if it proves the following: (1)"it has a substantial state interest in regulating the speech; (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." *Id.* at 564-565.

[9] *U.S. West v. FCC* at 1239.

[10] *Id.*

Hudson, it must *demonstrate* that it acted rationally and that "it narrowly tailored its regulations to meet its stated goals.[11]

Against this backdrop, SBC addresses below the issues raised in the NPRM concerning the Commission's approval mechanism.

II. Requiring Mandatory Opt-in Approval is Inconsistent with *Central Hudson*.

To retain its existing opt-in method as the sole permissible approval mechanism under Section 222(c)(1), the Commission would have to demonstrate that this requirement is no more extensive than necessary to meet the goals of that provision. As shown below, it could not do so. We begin, first, by addressing exactly what those goals are. Having thus defined the goals, we show that a mandatory opt-in requirement is not narrowly tailored to achieve those goals.

Section 222 as a whole addresses two purposes: (1) protecting customer privacy interests in a manner consistent with customer expectations, and (2) ensuring that certain types of information are available in a manner that is consistent with the pro-competitive goals of the Act. This latter goal — the goal of promoting competition — is reflected in sections 222(b), (c)(2) and (c)(3). Section 222(b) prohibits carriers from using the proprietary information of other carriers for competitive purposes.[12] Section 222(c)(2) operates to ensure that carriers share CPNI in their possession with other carriers that have obtained customer authorization. As the Commission determined in the *CPNI Order*, pursuant to section 222(c)(2), "BOCs cannot exclusively advantage their affiliates, and must provide competitors access when the customer says so."[13] Similarly, section 222(c)(3) requires LECs that use, disclose, or permit access to

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[11] *Id.*

[12] 47 U.S.C. § 222 (b).

[13] *CPNI Order*, ¶166.

aggregate CPNI to share such information with other carriers on reasonable and nondiscriminatory terms.[14]

Section 222(c)(1), on the other hand, does not address competitive issues; rather it focuses solely on ensuring that customer privacy expectations are realized. That much is evident from its subheading: "Privacy requirements for telecommunications carriers." It is also evident from the text of the provision, which permits carriers to use, disclose, or access CPNI, only to the extent and under circumstances consistent with customer expectations.[15] This goal – fulfilling customer privacy expectations by requiring approval of certain types uses of CPNI – is the touchstone upon which the Commission's section 222(c)(1) requirements must be based. Under *Central Hudson,* those requirements must be narrowly tailored to achieve this specific goal.

A mandatory opt-in approval mechanism is not tailored to effectuate this goal. To the contrary, it is premised on the faulty view that inaction by a customer cannot be taken as a manifestation of customer intent. There is no demonstrated basis for that view and it accordingly excessively burdens free speech.[16]

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[14] 47 U.S.C. §222(c)(3).

[15] Consumers clearly expect their provider to use their CPNI in connection with the services those consumers purchase to tell them about new products and services, including products and services offered by affiliated companies, related to the services they currently receive. Congress recognized this expectation and thus included subsections (A) and (B) in section 222(c)(1), which permit such use. Consumers, however, may have less of an expectation that carriers will use their CPNI in connection with other services and Congress accordingly prohibited such use without some manifestation of customer consent.

[16] Requiring mandatory use of the Commission's opt-in approach would not only abridge the free speech of carriers, but also of consumers. Consumers have a First Amendment right to receive information of interest to them. The Commission's opt-in approach indirectly restricts the ability of consumers to learn about new products and services from their providers and accordingly could not withstand constitutional scrutiny.

In fact, the Commission previously so concluded. In its 1987 *Nonstructural Safeguards proceedings,* the Commission determined that opt-out CPNI approval was adequate to safeguard consumer privacy and competition interests.[17] It found that "users and customers will be well-served by this [opt-out] approach," and noted that, under such an approach "customers can still control the dissemination of their CPNI both to protect the proprietary nature of such information and to control which enhanced service providers have access to it."[18]

Significantly, the Commission adopted this opt-out approach even though its goal was not merely to protect customers' privacy expectations, but to promote competitive parity. [19] Here, as noted, its goal is more limited: section 222(c)(1) – unlike certain other provisions of section 222 – is focused solely on privacy concerns and protecting customer expectations as to the use of their CPNI. Surely if, as the Commission previously found, an opt-out approach is

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[17] Report and Order, *In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof Communications Protocols Under Sections 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, 2 FCC Rcd 2072 (1987) (*BOC Enhanced Services Order*); Report and Order, *In the Matter of Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*); [17] Report and Order, *In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorization Thereof Communications Protocols Under Sections 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (*Phase I Order*).

[18] *BOC Enhanced Services Order*, 2 FCC Rcd at 3095.

[19] *Id.; see Phase I Order*, 104 F.C.C.2d at 1089-1090 ("The primary problem raised in the record is the potential for carriers to use the CPNI in their possession to market enhanced services to their competitor's customers. In theory, carriers can identify potential customers directly from their competitor's CPNI or indirectly by using the CPNI of those customers that access competitors' enhanced services through dedicated facilities. An additional problem is the concern of some user groups that the telecommunications information of some businesses is highly proprietary in nature and should not be disseminated to carrier personnel not involved in the provision of network services.")

sufficient to protect customers' privacy interests and competitive concerns, then it is *ipso facto* consistent with section 222(c)(1), which, as noted, reflects only privacy concerns.

Following enactment of the 1996 Act, the Commission again concluded that an opt-out approach is a sufficient mechanism for obtaining customer approval. Specifically, in the slamming context, the Commission streamlined its rules to allow carriers to provide subscribers advance written notice of a carrier change associated with a sale or transfer of a subscriber base, and to effectuate the change based on implicit customer approval.[20] Under the Commission's rules, the advanced notice must inform subscribers that their preferred provider will be changed to the acquiring carrier *unless* the consumer selects an alternative provider.[21]

In adopting these notification requirements, the Commission grappled with the same issues present here: whether advance written notification would constitute reasonable notification to subscribers and provide them sufficient information to allow them to make an informed decision. The Commission concluded that it would, finding, "if an affected subscriber receives notice of the transaction at least 30 days before it occurs, the subscriber will be able to make an informed decision as to whether to accept the acquiring carrier as his or her preferred carrier."[22] Where an affected subscriber chooses not to select an alternative provider, the failure to act constitutes approval to switch the subscriber from his or her preferred provider to the acquiring carrier.

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[20] First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129, *In the Matter of 2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket Nos. 00-257 and 94-129, 16 FCC Rcd 11218 (2001) (*Fourth Report and Order*).

[21] 47 C.F.R. § 64.1120(e)(3).

[22] *Fourth Report & Order*, ¶15.

If an opt-out mechanism is sufficient for a customer's carrier choice, it is sufficient, as well, for customer decisions regarding their CPNI. Indeed, the consequences of a failure to act in accordance with a customer's intent would seem to be more serious in the context of soliciting approval for a carrier change than in soliciting approval for use of CPNI. In the former context, the customer is subjected to a carrier change it does not want. In the CPNI context, in contrast, the customer receives an unwanted solicitation, and should this occur, the customer subsequently could restrict his or her CPNI. Indeed, the fact that an opt-out approval mechanism in no way precludes consumers from restricting the use or disclosure of their CPNI at any time is one more reason why such a mechanism is more than adequate to meet the goals of section 222(c)(1).

The rationale under which the Commission chose an opt-out approach in both the *Nonstructural Safeguards Order* and the *Slamming Fourth Report and Order* is equally applicable to section 222(c)(1). Section 222(c)(1), which was specifically adopted to safeguard consumer privacy, is silent on the type of approval mechanism necessary to effectuate this goal, rendering opt-out a viable mechanism. The Commission has yet to justify why opt-out is no longer sufficient to ensure consumer privacy, particularly when opt-out previously was adequate, not only to safeguard customer privacy, but to ensure competitive parity.

Moreover, other industries use opt-out, where the privacy information at stake is much more sensitive than CPNI. For example, financial institutions, pursuant to the Gramm-Leach-Bliley Financial Services Modernization Act,[23] are required to provide consumers notice of their privacy policy regarding the sharing of their nonpublic personal information[24] with affiliates and

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[23] Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. No. 106-472, 113 Stat.1338 (codified as amended in scattered sections of 15 U.S.C.).

[24] Financial institutions have access to sensitive information such as race and income.

third parties and provide consumers an opportunity to opt-out of the sharing of their information with third parties *prior* to any disclosure to third parties.[25] Consumers failing to opt-out are deemed to have given their approval to permit such financial institutions to share their private information with third parties. CPNI is far less sensitive than information held by financial institutions.

Likewise, health care providers use opt-out approval in the marketing of health-related products and services.[26] While these providers may use or disclose consumers' protected health information to market health-related products and services of the covered entity or third parties without prior consent,[27] the provider, during the initial marketing contact, must inform the consumer how to opt-out of further marketing communications.[28]

Given that financial institutions and healthcare providers may rely on opt-out procedures before using confidential information, it would be odd, indeed, for the Commission to mandate opt-in procedures. As noted, the information in the possession of financial institutions and health care providers is far more sensitive than CPNI, and given that Congress has found that opt-out procedures are sufficient for this highly sensitive information, it is difficult to understand how the Commission could conclude that opt-in procedures meet the fourth prong of *Central Hudson.* An opt-out notification would inform all consumers that the carrier would like to use their CPNI

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[25] *Id.* §§502, 503.

[26] Note that patient consent is required before a covered health care provider that has a direct treatment relationship with the patient may use or disclose protected health information to carry out treatment, payment or health care operations. 47 C.F.R. § 164.506.

[27] 47 C.F.R. § 164.514(e).

[28] *Id*., §164.514(e). In addition, the health care provider, in making the communication, must identify the covered entity that is making the communication and state that the covered entity is being compensated for making the communication.

for purposes outside of the existing carrier-customer relationship, and further would detail those purposes and methods by which a consumer could restrict use of their information. Consumers therefore would be equipped with the requisite information to make an informed decision regarding the use or dissemination of their information.[29]

The bottom-line is opt-out approval constituted sufficient approval prior to the Act and has been used by the Commission and other industries subsequent to the Act to adequately safeguard consumer privacy interests. There simply is an insufficient record to demonstrate otherwise or show proper tailoring.

III. The Commission Should Give Carriers the Flexibility to Use Opt-in or Opt-out Approval Methods, Subject to Minimum Notification Requirements.

The NPRM demonstrates that there are varying forms of opt-in and opt-out that could be used to secure customer approval.[30] For example, the Commission could permit carriers to secure oral consent simultaneously with verbal notification of CPNI rights; permit carriers to provide written notification of CPNI rights with a 30-day opt out-period; or permit carriers to employ an oral opt-out mechanism. SBC supports carriers having the flexibility to use any of the foregoing opt-in or opt-out approval mechanisms or other approval methods, subject to minimum notification requirements. In particular, carriers should be permitted to rely on oral, express consent, or oral or written opt-out consent, subject to a 30-day opt-out period prior to the use of CPNI.

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[29] Under the existing opt-in approach, consumers receive the notification during the solicitation with little time to digest the information. Under an opt-out approach, however, consumers would be provided the notification well in advance of any use by SBC, and thus could review the notice and ask questions.

[30] *NPRM* ¶ 23.

This approach would allow carriers to use the approval method best suited for the needs of different customers. For example, an opt-in approach might work best for large business customers, where carriers typically interact with these customers in face-to-face meetings. In this context, the most sensible way to obtain authorization to use CPNI is to explain to the customer face-to-face his or her CPNI rights and solicit the customer's authorization at that time. Opt-out, however, might work best for mass market customers, who primarily are targeted through telephone solicitations, where customer convenience is critical to the success of any telephone marketing campaign. So long as customers are fully informed of their CPNI rights and retain sufficient control over the use of their CPNI — the Commission's objective — the approval method should not matter. The Commission should not micro-manage the process or means by which CPNI information is provided.

Consistent with these principles, the Commission should modify its current notification requirements. The Commission's existing notification requirements, embodied in section 64.2007(f) of its rules, are onerous, particularly where a carrier chooses to use an oral approval method. Instead of specifying detailed notification requirements to be used with customer approval methods, the Commission should adopt notification guidelines sufficient to inform consumers of their CPNI rights, the purposes for which their CPNI will be used, and the methods by which consumers can restrict use of their CPNI. Carriers then should have the flexibility to fashion their notifications to comply with these guidelines.

SBC supports modification of section 64.2007(f) as follows, or in a similar manner:

> "Prior to any solicitation for customer approval, a telecommunications carrier must provide, via oral, written or electronic means, a one-time notification to the customer that informs the customer of what constitutes CPNI, describes the purposes for which CPNI will be used, informs the customer of the customer's right to restrict use of, disclosure of, and access to that customer's CPNI, and advises the customer of the precise steps that must be taken to restrict such use of the customer's CPNI."

This modification establishes the minimum notification requirements necessary to safeguard the privacy interests of section 222(c)(1). This rule requires carriers seeking CPNI consent to inform customers (1) that they seek to use their CPNI for purposes outside of the existing carrier-customer relationship, (2) of the purposes for which the CPNI will be used; (3) that the customer may restrict the use of, disclosure of, and access to his or her CPNI; and (4) the precise steps the customer must take to grant or deny access to his or her CPNI. Carrier compliance with this modified rule will ensure that consumers are fully informed of their CPNI rights. Additional rules simply are unnecessary to safeguard consumer control over their information. The Commission therefore should adopt this modified rule and eliminate the other notification requirements set forth in section 64.2007(f).

IV. The Commission Should Reaffirm Its Determination that Section 272(c)(1) Imposes No Additional CPNI Requirements.

There is no reason for the Commission to revisit its interpretation of the interplay between sections 222 and 272 if it adopts an opt-out approach. An opt-out approach does not call into question the Commission's conclusions in the *CPNI Order* and the *Reconsideration Order* regarding the meaning of the term "information" in section 272(c)(1), or the interplay between sections 272 and 222. Indeed, the Commission's analysis of these issues did not depend on its adoption of an opt-in approach. To the contrary, the Commission based its conclusions on a textual analysis of sections 222 and 272, and its determination that Congress intended to consolidate restrictions governing consumer privacy in CPNI "in a single, comprehensive provision" in section 222.[31] The Commission further based its conclusions on its determination

[31] *Reconsideration Order*, ¶142 ("We believe that the specific requirements governing CPNI use are contained in that section [222] and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating those constraints.").

that a contrary interpretation would not further, and indeed might undermine, the principles of customer convenience and control embodied in section 222, as well as customers' privacy interests.[32] In addition, the Commission concluded that the potential anticompetitive advantages that section 272 seeks to remedy are sufficiently addressed through the mechanisms in section 222.[33] Finally, the Commission found that its conclusions were consistent with the regulatory symmetry for carrier marketing activities mandated by section 272.[34] Each of these determinations applies irrespective of the mechanism (opt-in versus opt-out) adopted for obtaining customer approval for use or sharing of CPNI between a BOC and its section 272 or other affiliate.

Moreover, application of section 272 to a BOC's sharing of CPNI with its section 272 affiliate would abridge the BOCs' First Amendment rights. The Tenth Circuit has determined that intra-carrier speech is commercial speech. Accordingly, any Commission regulation restricting the ability of BOCs to share information with their affiliates would have to satisfy *Central Hudson*, which, as discussed below, it could not. In any event, even if section 272(c)(1) did apply to a BOC's provision of CPNI to its affiliate, which it does not, that provision does not apply to a BOC's "use" of CPNI to market the services of its section 272 affiliate or "solicitation" of approval to market the services of its section 272 affiliate.

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[32] *CPNI Order*, ¶160.

[33] *Id.*

[34] *Id.* ¶167.

A. Adoption of an opt-out approach does not implicate the Commission's prior conclusions regarding the interplay of Sections 222 and 272.

The Commission's conclusion in the *CPNI Order* and the *Reconsideration Order* that section 272(c)(1) does not impose any additional CPNI obligations on the BOCs did not hinge on its determination that section 222 mandated an opt-in approach for customer consent for use of their CPNI. To the contrary, it emanated from the Commission's interpretation of Congressional intent and assessment of the public interest. In assessing Congress' intent, the Commission determined that:

> In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating those constraints.[35]

This reasoning had absolutely nothing to do with whether a BOC used opt-in or opt-out to obtain a customer's consent to use its CPNI. The Commission looked at both statutory provisions and concluded that the most reasoned interpretation of Congress' intent regarding the interplay of sections 222 and 272 is that Congress did not intend to inject additional CPNI obligations in section 272.

The Commission further determined that:

> the burden imposed by the nondiscrimination requirements would…pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown. We do not believe that is what Congress envisioned when it enacted sections 222 and 272."[36]

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[35] *Reconsideration Order*, ¶142.

[36] *Id.; see also CPNI Order*, ¶159 (requiring a BOC that seeks customer approval to share CPNI with their statutory affiliates also to solicit approval for sharing on behalf of all other carriers that so request "would likely be so burdensome that, as a practical matter, BOCs would be effectively

Here again, the Commission's reasoning had nothing to do with how a BOC obtains customer approval for sharing CPNI information, but rather focused on its determination that, in section 222, Congress envisioned a sharing of customer CPNI among related entities that provide services to the customer, which "would be severely constrained or even negated by the application of section 272 nondiscrimination requirements."[37]

Further explaining why application of section 272(c)(1) to CPNI would be contrary to the public interest, the Commission determined that section 272(c)(1) would deprive consumers of "benefits associated with use and disclosure of CPNI among affiliated entities, upon customer approval."[38] In particular, it held that "section 222 contemplates a sharing of CPNI among affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs."[39] However, application of section 272(c)(1) to CPNI sharing, would, as the Commission found, require a BOC seeking customer approval to share CPNI with its section 272 affiliate simultaneously to solicit customer approval for CPNI sharing with all other carriers that ask them to do so.[40] Even under an opt-out approach, such a requirement would likely prove so burdensome that a BOC might choose not to disclose CPNI rather than be encumbered by a nondiscrimination obligation, precluding the BOC and its affiliate from offering customers customized marketing and

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precluded from seeking approval for affiliate sharing by means of oral solicitation — a result not contemplated by section 222").

[37] *CPNI Order*, ¶158.

[38] *CPNI Order*, ¶161.

[39] *Reconsideration Order*, ¶142.

[40] *CPNI Order*, ¶159.

packaging to the detriment of consumers. And, as the Commission found, effectively requiring a BOC and its affiliate to maintain separate customer records, where both are subscribed to by the same customer, "would not serve the customer's interest in receiving service in a convenient manner."[41]

Even if a BOC were to share CPNI with its section 272 affiliate under an opt-out approach, application of section 272 to CPNI would raise significant issues under section 222. First, as the Commission found in the *CPNI Order*, a BOC could not disclose CPNI to non-affiliated entities for the purpose of ensuring competitive access to CPNI consistent with the requirements of section 222, which permits sharing only where two affiliated entities both are providing service to the end user.[42] Second, requiring a BOC to solicit approval for unspecified "all other" entities would not constitute effective notice or customer approval for sharing CPNI. As the Commission stated:

> customers cannot knowingly approve release of CPNI unless and until they are made aware of the identity of the party which is to receive the information. Alternatively, as a practical matter, it would be difficult for BOCs to provide specific notice, and obtain informed approval, for each entity that so requests. To do so would severely restrict the BOCs' ability effectively to market, particularly in the inbound marketing context contemplated under section 222(d)(3), and thereby would again undermine the customer convenience policies of section 222.[43]

Here again, the Commission made no mention of opt-in or opt-out, and its analysis of the interplay of sections 222 and 272 applies irrespective of which approach to obtaining customer approval for sharing CPNI is utilized.

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[41] *Id.* ¶161.

[42] *CPNI Order*, ¶162.

[43] *CPNI Order*, ¶163.

In addition, the Commission concluded that " the three specific mechanisms in section 222 that address the competitive concerns implicated by a BOC's use of CPNI render the application of section 272's nondiscrimination requirement not essential."[44] First, the Commission determined that, under section 222(c)(1), a BOC could not share CPNI with its section 272 affiliate unless it obtained approval or the subscriber is an existing customer of the affiliate.[45] This is true irrespective of whether the customer's approval is obtained through an opt-in or opt-out approach. Such approval effectively "limits a carrier's anti-competitive use of CPNI,"[46] and ensures that any CPNI sharing merely promotes the customer's convenience and interest in obtaining tailored service offerings. Thus, the Commission's assessment of the competitive protections afforded by section 222(c)(1) did not rest on opt-in or opt-out, but rather on approval being obtained prior to the BOCs sharing of CPNI with their Section 272 affiliates.

Second, the Commission concluded that section 222(c)(2), which requires disclosure of CPNI to entities unaffiliated with a BOC upon their obtaining a customer's affirmative written request, precludes a BOC from exclusively advantaging its affiliates. And, third, it found that section 222(c)(3) ensured that a LEC did not obtain a competitive advantage through its store of customer information.[47] In addition, the Commission found that sections 251 and 201(b) further mitigated competitive concerns by requiring a BOC to disclose customer information as part of its interconnection obligations and requiring the BOC to act in a reasonable manner.[48] Again,

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[44] *Id.* ¶164.

[45] *Id.*

[46] *Id.*

[47] *Id.* ¶165.

[48] *Id.* ¶¶165-166.

none of these findings depended on whether a BOC uses an opt-in or opt-out approach for obtaining customer approval to share CPNI with its section 272 affiliate, and, indeed, each of them applies irrespective of which method the BOC uses.

Finally, the Commission found that its conclusion was consistent with the regulatory symmetry Congress required for carrier marketing activities.[49] Here again, imposing a nondiscrimination requirement on a BOC that seeks to share CPNI with its affiliates (including its section 272 affiliate), without imposing a similar requirement on the BOC's competitors, would undermine regulatory symmetry for marketing activities mandated by section 272. This is true irrespective of the method used for obtaining customer approval for such sharing.

B. Application of Section 272(c)(1) would bridge free speech.

Application of section 272 (c)(1) to BOCs' sharing of CPNI with their section 272 affiliates would unconstitutionally abridge the BOCs' First Amendment rights. The Tenth Circuit determined that intra-carrier speech (communications between affiliates, divisions and employees) is commercial speech.[50] A Commission regulation restricting the ability of BOCs to share CPNI with their section 272 affiliates unquestionably would inhibit BOCs ability to customize speech. To justify such a regulation, the Commission would have to satisfy *Central Hudson*.[51]

This would be difficult, if not impossible. First and foremost Congress did not require the Commission to apply section 272 to a BOC's sharing of CPNI with its section 272 affiliate. Second, because there is no statutory support for such a restrictive interpretation of Section

[49] *Id.* ¶167.

[50] *U.S. West v. FCC*, at 1233.

[51] See Section I, Background, *supra*, for an extensive discussion of the four-prong test of *Central Hudson*.

272(c)(1), the Commission would be hard-pressed to demonstrate that there is a substantial governmental interest in interpreting Section 272 in this manner, particularly given the foregoing public policy reasons and competing governmental interests embodied in Section 222. Third, the Commission likely could not demonstrate proper tailoring because an obvious, substantially less restrictive alternative — opt-out — exists.

C. Even if Section 272(c)(1) applied to CPNI, it would not apply to a BOC's use of CPNI to market Section 272 affiliate services.

If the Commission were to conclude, incorrectly, that CPNI constitutes information for purposes of Section 272, the non-discrimination obligations of Section 272 would arise only where a BOC actually "provides" CPNI to its Section 272 affiliate. In particular, Section 272(c)(1) states that a BOC

> may not discriminate between that company or affiliate and any other entity in the *provision* or procurement of goods, services, facilities, information, or in the establishment of standards…[52]

However, a BOC's use of CPNI to market the services of a Section 272 affiliate does not constitute the *provision* of information and therefore is not subject to Section 272(c)(1). When a BOC uses CPNI to market the services of a Section 272 affiliate, it does not actually provide the CPNI to that affiliate; consequently, the non-discrimination obligations of Section 272 are not triggered. Nothing in the legislative history of Section 272 suggests that Congress intended for the term "provision" to encompass "use." Joint marketing whereby CPNI is used by BOC representatives to market an affiliate's services, but not shared with the affiliate is typical for SBC. In many instances the only information provided to the Section 272 affiliate is billing

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[52] 47 U.S.C. §272(c)(1).

information, which clearly is permissible under Section 222(d) and not subject to disclosure to third parties under Section 272.

In any event, under section 272(g)(3), a BOC's use of its CPNI to engage in exclusive joint marketing of the interLATA services of its section 272 affiliate, which is permitted under section 272(g)(2), is not subject to the nondiscrimination obligations of section 272(c)(1). Section 272(g)(3) specifically provides, "The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c)."[53] The use of CPNI is integral to joint marketing. Indeed, the essence of marketing is the use and development of information to determine the products and services customers might desire. The Commission could not have intended BOCs to ignore their CPNI and engage in blind marketing of their affiliates' services. To hold so would render section 272(g)(3) meaningless. Thus, to the extent the Commission examines the use of CPNI pursuant to section 272(g), it should conclude that BOCs or BOC affiliates that use or disclose CPNI as part of the joint marketing activities expressly permitted under section 272(g) are not subject to section 272(c)(1).

D. BOC solicitation of approval to market its affiliates' services does not constitute a "service" under Section 272(c)(2).

Solicitation of customer approval to use or disclose CPNI does not constitute the provision of a "service" under Section 272, even if the solicitation seeks customer consent to market Section 272 affiliate services. The solicitation is a communication provided directly to the BOC customer, wherein the BOC asks permission to provide the customer additional information about new products and services. If such communication could be deemed a service, it is one provided by the BOC to its customer, not to an affiliate. Further, when a BOC solicits

[53] 47 U.S.C. §272(g)(3).

CPNI approval from a customer, it does so to market or sell additional products and services offered by the BOC outside of the existing carrier-customer relationship, which *could* include services of its Section 272 affiliate. There is, however, no separate service provided to the Section 272 affiliate.[54]

Moreover, nothing in Sections 222 or 272 requires a BOC to solicit approval for unaffiliated entities. Section 222(c)(1) requires BOCs, and indeed all carriers, to solicit approval to market "out-of-the category" services to their customers, not to solicit approval for third parties. Section 222(c)(2) mandates that carriers disclose CPNI to third parties upon affirmative written customer approval, arguably a nondiscrimination obligation, but clearly not a solicitation obligation. Section 272(c)(1) restricts the ability of BOCs to discriminate in favor of their affiliates in the provision of information or service, but no where defines service to include solicitation of approval. The fact that Section 222 does not expressly or implicitly require carriers to solicit approval for other carriers can only mean that Congress did not intend such a result.

V. Conclusion

For the foregoing reasons, SBC requests that the Commission revise its CPNI rules to permit carriers the flexibility to use opt-in or opt-out, subject to minimum notification requirements. Further, the Commission should not re-examine the interplay of Sections 222 and

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[54] Even if solicitation of customer approval to use CPNI to engage in permissible joint marketing of section 272 affiliate services did constitute the provision of "service"" it would not be subject to the nondiscrimination requirements of section 272(c)(2). As discussed above, section 272(g)(3) specifically excepts permissible joint marketing from the nondiscrimination requirements of section 272(c)(1).

272, but rather reaffirm its prior conclusions regarding the non-application of Section 272(c)(1) to CPNI.

Respectfully Submitted,

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